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Moving Migrants, States, and Rights

Human Rights and Border Deaths

Abstract: This article begins to undertake a human rights analysis of the increasing number of migrants who die annually while trying to cross the borders of Europe in an irregular manner. Over the past 20 years, border policies increasingly focus on (pro-active, extraterritorial, privatized, and securitized) border management instead of on classical (reactive, territorial, and public) border control. On the basis of existing data, it seems plausible to assume that the increasing migrant mortality is an unintended side-effect of this shift from control to management. The article argues that it is possible to collect data, which are more reliable than those presently available, and presents data from a pilot project carried out on Sicily in November 2011. Presuming better data can be collected; two diverging human rights approaches are developed – a conventional approach holding that European states are not accountable under human rights law for these side-effects and a functional approach holding that human rights law does impose obligations on European states in this context. On all four doctrinal issues which are relevant to the problem (jurisdiction, positive obligations, standing, and collective state responsibility), these diverging approaches lead to diverging doctrinal positions. A choice between the two approaches implies not only legal but also moral, ethical, and political choices.

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Introduction

Two decades ago, up to 250 migrants per year were registered as having died while trying to cross the borders of Europe in an irregular manner. They were shot by border guards, had stepped on mines, or had drowned in rivers or at sea. Today, the annual number of registered border deaths is between 1,500 and 2,000.

This increase in registered border deaths has taken place in the context of (and, in my hypothesis, is related to) a fundamental shift in European border

policies. Border policies do not aim at rejecting unwanted individuals at the physical border, but at influencing behavior of potential migrants in countries of origin or transit by European policies. This shift from border control to border management, which forms the context of this article, is described in section “Historical Perspective”. In this article, I rely on the hypothesis that not only more migrants but also an increasing percentage of migrants is dying *en route* to Europe. In section “Empirical Perspective”, I present empirical material that makes this a plausible hypothesis. Furthermore, I enquire whether it is possible to collect better data. This is important, because the empirical data presently available are problematic, and better data are necessary in order to analyze border deaths in human rights terms. After examining these two preliminary issues, I address (in section “Legal Perspective”) the human rights issue that forms the core of this article: Are European states liable for the loss of life of migrants at sea?

Two academic studies have mapped the related issue of the human rights consequences of the externalization of asylum policies.¹ In its 2012, Hirsi Jamaa judgment about the Italian pushbacks of Somalian and Sudanese migrants to Libya, the European Court of Human Rights has confirmed their findings that if state agents act outside the territory of the state, they remain responsible under human rights law.² It was important, but not surprising that this was established, because human rights law has never been inclined to accept that manipulating territoriality allows state agents to do abroad what they are not allowed to do at home.³ Border policies pose a challenge that is even more problematic than the externalization of asylum policies. The state agents making and implementing border policies are active predominantly on European territories, but the effects I focus on here are mostly indirect: They affect migrant behavior not by turning them back at the border, but by inducing them to use other itineraries. If – the *prima facie* plausibility of this will be argued below – these effects result in a considerable increase in migrant mortality, is human rights law applicable as a set of norms that can govern their acts? Or are border control policies successful in slipping out from under the aegis of human rights law? If

1 THOMAS GAMMELTOFT-HANSEN, *ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND THE GLOBALISATION OF MIGRATION CONTROL* (2011); MAARTEN DEN HEIJER, *EUROPE AND EXTRATERRITORIAL ASYLUM* (2011).

2 Hirsi Jamaa and others v. Italy (App. No 27765/09) 2012 Eur. Ct. H.R. (GC), *see especially* paras. 70-82.

3 U.N. Comm’n on Human Rights, *Burgos v Uruguay*, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40), at 176 (1981); U.N. Comm’n on Human Rights, *Casariago v. Uruguay*, Communication No. 56/1979, U.N. Doc. CCPR/C/OP/1, at 92 (1984).

states succeed in spatially splitting state acts from the effects of these acts; and if the acts occur on the territory while the effects occur extraterritorially, are they exempt from human rights responsibility? These issues are beyond the issues that were examined in existing academic studies and available case law. Therefore, it is necessary to subject them to a separate analysis.

A note on terminology: The phenomenon I am looking at is people who die while trying to enter Europe. This may happen at sea by dehydration or drowning, by suffocation in trucks, or they may freeze to death while waiting for a possibility to cross the border. I am not looking at people who died in their country of origin, as a consequence of war or persecution, and who would not have died had they had the chance to migrate to Europe. My research concerns people who have died while they were actually trying to do so. Furthermore, I do not distinguish between migrants on the basis of the reason they had for migrating. This is not only for methodological reasons (the people themselves have died, hence they are not around to ask) but also because their reasons for migrating are irrelevant in answering the question of whether European states may be liable for the unintended side-effect of their border policies, which purportedly is increased migrant mortality.

Historical Perspective

Since World War II, European states have created modern bureaucratic systems to manage immigration: They introduced new legislation, established a system of residence permits and entry visa, distinguished between admission (border control) and residence (permits), created links between residence and access to the labor market and social security, set up asylum procedures, and allowed immigration to be subject to judicial review. When this happened in the late 1950s and 1960s, the aim was to regulate labor migration. This enormous effort, which took place in all northwestern European states between 1950 and 1980, despite regional and national particularities, did not necessarily have the desired effect of controlling migration and migrants. However, it did create a specialized bureaucracy, with the personnel, the conceptual framework, and the legal tools that make migration control into a plausible enterprise. These policies allowed European states to deal bureaucratically with their migrant labor force. When labor migration policies were put to a halt in the mid-1970s, the system was adapted, but did not need to be changed to manage family and asylum migration that became dominant after the end of formal labor immigration policies.

With the fall of the Iron Curtain in approximately 1990, long distance air traffic increased dramatically, and European integration expanded (i.e. the 1992 Maastricht Treaty⁴), and the policies developed during the post-War era were subject to a dual shift. First, migration policy was scaled up from the national to the European level (1985 and 1990 Schengen Agreements; Third Pillar of the EU⁵). This was initiated by civil servants more than by immigration ministers and was intended partly to make migration policies more effective by bundling them, somewhat by the notion of sidestepping control systems that were predominantly national such as parliament and the judiciary.⁶ In the same move, migration policy became increasingly pro-active: Instead of just administrating migrants who had already turned up at European airports or aliens police stations, the aim was to prevent unwanted migrants from departing on their way to Europe. Migration policies were linked to visa policies: Countries of origin from which less desired migrants originated were made subject to visa obligations, culminating in the common European visa system (the European Visa Code: Regulation 810/2009⁷). Carriers (airlines and shipping companies) were made responsible for checking the passports and visa of passengers before boarding. European liaison officers at foreign airports “advise” airline personnel as to the documentation of passengers. European priorities were set, and in 2004 Frontex, the specialized EU agency for guarding the European coastline was created (Regulation 2007/2004, amended by Regulation 1168/2011).⁸ Border control is securitized, with hi-tech equipment such as sophisticated radar systems at sea and carbon dioxide sensors in lorries.

⁴ Treaty on European Union (Maastricht text), July 29, 1992, 1992 O.J. (C 191/1).

⁵ 1985 and 1990 Schengen Agreements; see 2000 O.J. L. 239 O.J. (L 239); Third Pillar of the EU was introduced with the Treaty of Maastricht (Consolidated version, Aug. 31, 1992, 1992 O.J. (C 224) and was eventually abandoned on Dec. 1, 2009 upon the entry into force of the Treaty of Lisbon (*infra* note 10).

⁶ See on these developments, HUUB MEIJERS ET AL., *DEMOCRACY, MIGRANTS AND POLICE IN THE EUROPEAN UNION: THE 1996 IGC AND BEYOND* (1997); Virginie Guiraudon, *European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping*, 38 J. COMMON MARKET STUD. 251 (2000); THE EMERGENCE OF A EUROPEAN IMMIGRATION POLICY (Philippe De Bruycker ed., 2003).

⁷ Council Regulation 810/09/EC on the European Visa Code, 2009 O.J. (L. 243).

⁸ Council Regulation 2007/2004/EC Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 O.J.(L. 349/1), amended by Regulation 1168/2011, Council Regulation 1168/201/EC amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2011 O.J. (L. 304/1).

Migration policies, of which most instruments had already existed under the earlier system, fundamentally changed in character.⁹ Where they had been reactive and national, they increasingly became pro-active and European. Parliamentary control lagged behind; it was not until the Lisbon Treaty (2007)¹⁰ that the European Parliament acquired its proper role in European migration and asylum policy, as did the Court of Justice. In the 15 years between the Maastricht Treaty, which inaugurated embryonic European competences in migration policy, and the Lisbon Treaty, the externalization of European migration policies had taken place. The legacy of the 15-year democratic and judicial gap left a legal gap: that is, to what extent are European states legally accountable for the external effects of migration policies? The effects of migration policies used to occur on their territories were seen by the public, and thus, sensitive to public opinion, and supervised by parliament and the judiciary. They now take place in part outside European territories, public opinion needs mediators such as NGOs and humanitarian organizations for information, while parliaments and the judiciary – even if provided with sufficient reliable information – hesitate whether these effects are within the scope of their competence and authority.

Part of this change was an innovation in border policies. Until a few decades ago, border controls took place at borders. Migrants were either admitted or refused entry at ports, airports, or land-border crossings. The problems and expenses of removal, especially in ports and airports, led European states to shift border control to places beyond their borders. Carrier sanctions (in the form of fines for airlines transporting undocumented migrants) are an example and are sometimes combined with agents of European states advising airlines about the genuineness of travel documents at check-in counters. The consequence of carrier sanctions is that migrants shift their travel routes to land and sea. This is especially problematic, as the sea routes are inherently more dangerous than air travel. Another example of border control policies is the subsequent intensification of control at sea, with the aim of blocking short and relatively safe routes, such as the Strait of Gibraltar and the Adriatic Sea between Albania and Southern Italy. Migrants then choose ever longer and riskier routes.

The increasing number of migrant deaths has taken place in the context of a fundamental shift in European policies. Initially, states engaged in border control, which took place *at the border*, which concerned the *individuals* who turned

⁹ I refer here to what Sassen calls “capabilities” which “jump tracks.” The conceptual framework used here is based on SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* (2006).

¹⁰ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1.

up at their border, and which was *reactive* in that it waited until a person turned up at the border. Over the years, we have witnessed a development toward border management. Border management takes place at the *European* level and aims at effects *beyond* the border (in countries of origin or transit). It seeks to influence the behavior of migrant *populations*, and it is *pro-active* by aiming at prevention of irregular departure.

Empirical Perspective

If we want to analyze whether European states may be accountable for border deaths, we will have to rely on presumptions as to how many migrants died when and where as only problematic data are available. The most comprehensive, Europe-wide set of data is the list of fatalities of United, an international NGO based in Amsterdam.¹¹ This list is based on press reports. In one way, these data are over-inclusive, because they also include people who, for example, committed suicide while residing in an alien detention center in Europe. With that, their number is low. A later data set, which is comparable in methodology and shows comparable trend, is the one of Fortress Europe.¹² Local, short-term studies¹³ lead to higher numbers than the ones by United and Fortress Europe but for smaller areas (Spain and Sicily, respectively), and for short periods. Kiza has summarized the data available, using the United data as a starting point.¹⁴ His methodology is more sophisticated than the one of United/Fortress Europe, as he has (a) excluded people who did not die on their way to Europe but, for example, committed suicide in European detention centers and (b) complemented the United data with other media sources. Despite this more refined methodology, he comes up with a development of the number of fatalities that is very similar to the incorrect number. A bigger source of concern is the reliability of

¹¹ www.unitedagainstracism.org.

¹² www.fortresseurope.blogspot.com.

¹³ Dirk Godenau & Vicente Manuel Zapata Hernández, *The Case of the Canary Islands (Spain): A Region of Transit Between Africa and Europe*, in *IMMIGRATION FLOWS AND THE MANAGEMENT OF THE EU'S SOUTHERN MARITIME BORDERS* 13 (Gemma Pinyol ed., 2008), available at www.cidob.org/en/content/.../8449/.../doc_migraciones_17.pdf; Jorgen Carling, *Migration Control and Migrant Fatalities at the Spanish-African Borders*, 41 (2) *INT'L MIG. REV.* 316 (2007) and Paolo Cuttitta, *Il controllo dell'immigrazione tra Nordafrica e Italia*, *reprinted in LIBRO BIANCO, I CENTRI DI PERMANENZA TEMPORANEA E ASSISTENZA IN ITALIA UN'INDAGINE PROMOSSA DAL GRUPPO DI LAVORO SUI CPTA IN ITALIA* 169 (Nicoletta Denticò e Maurizio Gressi eds., Rome, 2006).

¹⁴ ERNESTO KIZA, *TÖDLICHE GRENZEN – DIE FATALEN AUSWIRKUNGEN EUROPÄISCHER ZUWANDERUNGSPOLITIK* (2008).

press reporting. Press attention for border deaths may not reflect the actual number of border deaths. No sources address the issue of dark numbers; the articles of Cuttitta and Carling¹⁵ suggest that these are considerable.

In this text, I present the United data, problematic as they are, for two reasons. First, Kiza's more precise data reflect a trend that is very much like that present in United's data. Second, the United data are available as an Excel file, and as a consequence take less time to work with than the Fortress Europe data. In addition, Kiza's data only concern the period 1994–2004.

Figure 1 illustrates that the number of almost 2,000 fatalities for 2011, while dramatic does merely constitute a further development of the upward trend we see in the figure. The dip in 2010 is improbable and is more likely to reflect the unreliability of the data rather than an actual drop in migrant deaths.

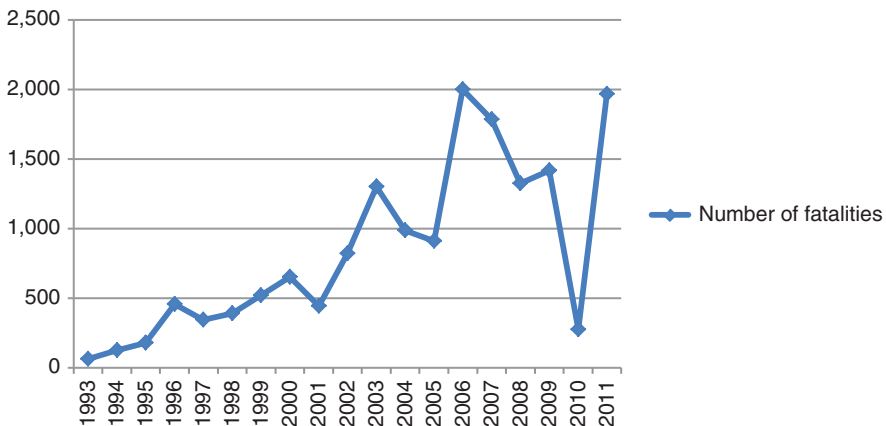


Figure 1: Migrant fatalities in the EU Migratory System (1993–2011)

Source: United 2012.

For the feasibility of a human rights analysis of migrant deaths, it is important to know whether data of better quality can be collected. If not, then a human rights analysis will have to rely on empirical presumptions that, even when they are plausible, make the analysis vulnerable. In order to assess whether a human rights analysis with a solid empirical basis is at all possible, I have undertaken a pilot project.

¹⁵ See *supra* note 13.

Triangulation: An Exploratory Project on Southern Sicily

In November 2011, I have checked the registry of deaths in two municipalities in southern Sicily (Statu Civile of Pazzallo and Porto Empedocle), with a double aim. First, I wanted to find out whether these local death registries are accessible for research purposes. Second, I wanted to find out whether consulting these registries (which should contain entries for all bodies found in Italian waters or on Italian shores) would add information.

Figure 2 summarizes the data on deaths that were registered in the Statu Civile of Pazzallo and Porto Empedocle for the period 1993–2010. I have compared these data to those from United¹⁶ and Fortress Europe,¹⁷ as well as to the list published by the Special Commissioner for Disappeared Persons of the Italian Home Office.¹⁸ The full comparative data are given in the Annex to this article.

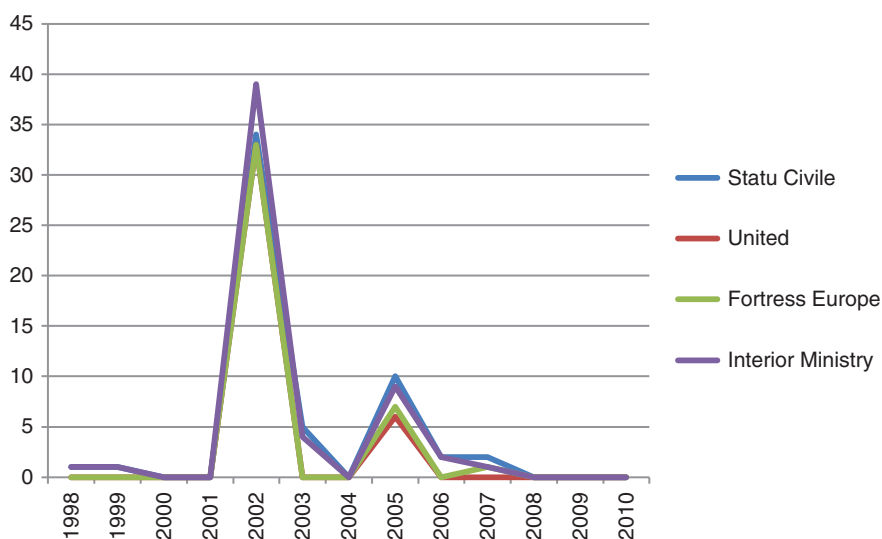


Figure 2: Migrant fatalities registered in Pazzallo, Porto Empedocle 1998–2010, according to four sources

¹⁶ <http://www.unitedagainstracism.org/pdfs/listofdeaths.pdf>.

¹⁷ <http://fortresseurope.blogspot.com/2006/01/press-review.html>.

¹⁸ http://www.interno.it/mininterno/export/sites/default/it/assets/files/20/0404_REGISTRO_CNI_al_31122010.pdf.

These data show that, indeed, data based on local civil registries are more reliable than those of United and Fortress Europe. They suggest that the data of the Italian Ministry of the Interior are more inclusive than those of the local civil registries. However, whereas United has entered 6,821 migrant deaths between 1993 and 12 May 2012, the Italian Ministry of the Interior lists only 778 deaths for the period 1969–2010, while these data predominantly concern the homeless not migrants.¹⁹

Yet another source is the registries of the public prosecutor of the district court. As the corpses of the migrants are *corpus delicti*, the public prosecutor must permit their burial. These data – at the provincial level – are available at an aggregate level as opposed to that of the communities. Presently, I am trying to get these data from the public prosecutor in the province of Agrigento, in which both Pazallo and Porto Empedocle are located.

One more source – the registries of local cemeteries – could be added. I found these to be very hard to access. In addition, bodies are not necessarily buried in the same locality where their death has been entered in the *statu civile*, so it might be difficult to determine which grave corresponds to which entry in the *statu civile*.

The aim of this exploratory project was twofold. First, I wanted to use triangulation: Look at the same phenomenon using different sources. Second, I wanted to explore which source was most reliable and whether using the most reliable source added much information. On the basis of this, I conclude that indeed all dead persons are entered in local death registries. The same data should be available at provincial level from the public prosecutor's office; as noted, I am still working on getting these. When we compare the sources, we see that the *statu civile* and the Ministry of the Interior are both relatively complete and that relying on their information indeed adds to the information of United and Fortress Europe. Because of the unreliability of the Interior Ministry's data for the entire period (see above), the *statu civile* seems to be the most reliable source. However, relying on the NGO data would have given much the same picture, because the trends in the NGO data are the same as those in the *statu civile* and Ministry of the Interior data. Because the exploratory research was limited to two municipalities, these conclusions cannot be generalized without further investigations.

On the basis of this exploratory project, it seems plausible to concur that this research method (consulting local death registries) can lead to a comprehensive data set on the number of deaths, the approximate time of death, and the place where the bodies were found. This method could be used along the

¹⁹ I conclude this from the place where the migrants were found, which is mostly on the Italian mainland, far from the shore or the border.

Mediterranean coast. Even so, it is clear that there are various problems with this method: (a) some people wash up at the coast on the southern and eastern side of the Mediterranean or of the Atlantic, and (b) some bodies will never be found. On the first issue: there are no reasons to believe that the number of bodies that wash up on the shore of departure develops differently from that of people which wash up at European shores. Here, the problem is to estimate the dark number, but this dark number will probably not influence the pattern (increase, decrease) shown by the data from European death registries. For the second issue, this is different. As travel routes become longer (in order to evade intensified controls at short and safe routes), as the boats used become of lower quality (the likelihood that they will be confiscated increases), and as trips are more frequently made under bad weather conditions (lower visibility), it is more likely that people die at sea far from the shore, and that their bodies are never found. Therefore, presumably that dark number increases in relation to the number of known deaths. This is a problem (because it makes it harder to estimate the fatalities). However, the number of known deaths rises steadily; and the relative number of unknown deaths rises as well. As these trends run parallel, the problem does not make it impossible to analyze the developments in the number of border deaths, as long as there are convincing reasons to assume that the (unknown) dark number is rising.

At this moment in time, conclusions about the empirical aspects of border deaths must be tentative. The data presently available show a tenfold increase in the absolute number of migrant deaths over the past 20 years. It seems unlikely that the absolute number of irregular migrants has increased by a factor ten as well. Therefore, the hypothesis that not only the absolute but also the relative number of border deaths has increased is plausible. On the basis of the development of European border policies over the past 20 years, in combination with the available data on border deaths during the same period, the remainder of this article will proceed on the basis of the hypothesis that the shift from border control to border management has been accompanied by an increase of migrant mortality. It is duly noted that, at present, this is hypothesis, but the pilot project described above has shown that this hypothesis can be put to the test by means of further empirical research.

Legal Perspective

The question which this article raises for investigation is whether the hypothesized relationship between European border control policies of the past two decades on the one hand, and the rising number of border deaths leads to a

(moral and) legal obligation of European states to address the rising number of border deaths on the other hand. I focus on the right to life, which arguably has been violated vis-à-vis the deceased migrants, although one might look at other rights (most notably the rights of survivors, who suffered during the trip that their fellow migrants did not survive, and who for protracted periods afterward may suffer from survivors' trauma). However, addressing the position of survivors would complicate my argument, without shedding new light on the crucial issues, and, therefore, I refrain from looking at their position.

On border deaths, two approaches are conceivable. The first, conventional one, would be to emphasize that these deaths occur indirectly (i.e. state agents are not killing migrants, but policies arguably have as a side-effect that irregular migration becomes more dangerous) and often outside the territory of European states. This lack of direct state involvement and of a direct link with the territory stands in the way of state accountability for migrant deaths. The second, innovative one, would emphasize that the increased number of deaths is a consequence of changes in state policies. As these policies side step human rights norms,²⁰ human rights law has to adapt so as not to become obsolete. I refer to this innovative approach as functional.²¹

I develop a conventional approach and a functional approach on the four issues that are relevant in our context. The first is jurisdiction. The migrants mostly were not under direct control of European State authorities when they drowned, and often, they were not in their territorial waters either. This raises the issue of whether they were within the jurisdiction of European state. The second issue concerns positive obligations. It seems unlikely that the problem of border deaths is most fruitfully conceived of as one involving a negative obligation. European States could abolish border controls in order to reduce the number of border deaths. However, as the legitimacy of border controls has consistently been underlined by, among others, the European Court of Human Rights,²² one can hardly expect them to stop a practice that in itself is lawful. But it does make sense to enquire what states could *do* in order to limit this lethal side-effect of their border control policies – and that means we have to face the issue of positive

20 REBECCA ADLER-NISSEN & THOMAS GAMMELTOFT-HANSEN, SOVEREIGNTY GAMES: INSTRUMENTALIZING STATE SOVEREIGNTY IN EUROPE AND BEYOND 17-24 (2008).

21 I take the term from Yuval Shany's article. See Yuval Shany, *Taking Universality Seriously: A Functional Approach to Extraterritoriality in Human Rights Law*, 7 (1) L. & ETHICS HUM. RTS. (2013).

22 The standard passage states that, as a matter of well-established international law, have the rights to control the entry of non-nationals into its territory. See, i.e., Abdulaziz, Cabaes and Balkandali v. The United Kingdom (App. Nos. 9214/80, 9473/81, 9474/81) 94 Eur. Ct. H.R. (Ser. A) (1985).

obligations. Third, I examine standing: who can represent the interests of deceased migrants, and of prospective migrants whose chances of surviving arguably are influenced by the policies of European states? Last, I address the problem of collective state responsibility. Because the intensification of border controls at the southern maritime borders is a joint undertaking of European states, the issue is one of joint responsibilities.

I address these issues primarily by referencing the European Convention on Human Rights (ECHR) – the human rights convention with the closest geographical relation with the issue under consideration. Also, the competent court [the European Court of Human Rights (ECtHR)] can give binding judgments and has developed a rich case law relevant in our context.

Jurisdiction

In the context of border deaths, can states be held responsible for acts which either occur outside their territory (including their territorial waters), or the effects (i.e. migrant deaths) of which occur outside its territory? In terms of the ECHR, this translates into the issue of whether the alleged victim of the state action is within the jurisdiction of the state.

For our purposes, three situations have to be distinguished:

- State acts take place within the territory of the state (including its territorial waters), and effects of those acts take place *within* the territorial waters of that same state;
- State acts take place within the territory of the state (including its territorial waters), and effects of those acts take place *outside* the territorial waters of that same state;
- State acts take place on the high seas, or in the territorial waters of other states in *clearings* expropriations.

The first situation is entirely unproblematic for both the conventional and the functional approaches. Both the state act and its effects take place within the jurisdiction of the state in question. Of course, this does not mean that a violation of some convention right occurred, as jurisdiction does not imply that there is a sufficient causal relation between state act and effect, and it remains to be seen whether the effect entails a violation of a convention right at all. But whatever difficult issues remain, jurisdiction is not one of them. This is comparable to the responsibility of East German leaders for the shooting of migrants at the Iron Curtain.²³

²³ Streletz v. Germany (App. Nos. 34044/96, 35532/97, 44801/98) 2001-II Eur. Ct. H.R.

The second situation seems altogether different. The person affected by the state act is outside its territory. In the case law of the ECtHR, two streams can be distinguished: One, which fits with the conventional approach, is exemplified by *Banković*, in which the Court held that jurisdiction is primarily a territorial concept and gaps in human rights' protection do not imply that the Convention is to be applied throughout the world.²⁴ *Banković* indeed stands in the way of reasoning that seeks to hold state accountable for any consequence of its acts, wherever in the world they occur. However, three aspects in particular distinguish the facts of *Banković* from those in border death cases. First, in *Banković*, the applicants relied on the notion that a situation can be in the jurisdiction of two (or, because of the NATO aspect of the case, even more) state at the same time. This issue of competing jurisdictions is not at stake here, because border deaths will usually occur on the high seas or in the territorial waters of European states. Second, the state acts, which arguably lead to the effects outside the territorial waters of the state (being border policies and their implementation), are undeniably acts that take place predominantly *within* the jurisdiction of the state. That is different from a situation in which airplanes carry out bombardments *outside* the territory of the relevant Member State. Third, present day border policies are designed in part with the specific aim of escaping from state responsibility. One of the attractions of carrier sanctions and interception is that in this way states seek, often successfully, to evade the effect of the prohibition of refoulement. The gap in human rights' protection that exists if one denies jurisdiction in these cases is a gap created by the shift from control to management.

Another, functional approach is conceivable. One may point to *X and Y v. Switzerland*, in which the Commission held that state responsibility can be engaged by acts of its authorities producing effects outside its own territory.²⁵ A German national was prohibited entry into Liechtenstein on the basis of a Swiss decision applying the Swiss aliens law. An international agreement between Liechtenstein (not a party to the ECHR) and Switzerland (which is a party to the ECHR) essentially made Swiss aliens law applicable in Liechtenstein, which had no aliens law of its own. The Commission considered that it was the Swiss authorities that had acted, although with effect on the territory of Liechtenstein. Therefore, Switzerland was held responsible for the effect that the prohibition of entry produced in Liechtenstein.

²⁴ *Banković et al. v. Belgium* (App. No. 52207/99) and 16 other Contracting States, 2001–XII *Eur. Ct. H.R.* 333. (GC). See Kees Wouters, *International Legal Standards for the Protection from Refoulement* 211–16 and the sources quoted there (2009) (examining *Banković* extensively).

²⁵ *X. and Y. v. Switzerland*, 9 *Eur. Comm'n. H.R. Dec. & Rep.* 57 (1977).

The conventional approach would deny state responsibility, because the event occurred outside the state's territory, without direct and active involvement of a state agent. The state was not in control of the situation in any way. The functional approach would hold that in this specific context (i.e. externalization of border policies), it would be artificial to argue that the victim is within the jurisdiction of the state if a boat capsizes within the territorial waters of a state, while the person is presumed not to be within the jurisdiction of that state if the same boat capsizes just beyond the territorial waters of that State. In both situations, the argument (whether one accepts that argument is another question) is that people drown as a consequence of the way in which border policies are carried out; they are – so the argument goes – directly affected by those policies, regardless of whether the victims are within or beyond the territorial waters of the state. Furthermore, the functionalists could point out that the Court's position on the relevance of territoriality is quite unclear.²⁶ In standard case law, the Court holds that acts performed *or producing effects outside* (author emphasis) their territories can constitute jurisdiction.²⁷

The third situation is, once more, unproblematic in both the conventional and the functional approaches. The Court dealt with it in *Xhavara*.²⁸ This decision concerned a boat with undocumented migrants which was struck, at 35 sea miles from the Italian coast (i.e. outside its territorial waters), by an Italian marine vessel and sunk as a consequence. The Court nowhere objects that the victims were not in the jurisdiction of Italy. In this case, the entire situation took place outside the territorial waters of Italy, and therefore has less ties with Italian territory than the second situation, being extraterritorial effects of acts carried out mainly within the territory of a state. It is remarkable that in the *Xhavara* case, with strong parallels to *Bankovic* (extraterritorial acts with extraterritorial effects) the Court did not even consider the jurisdiction issue, apparently finding the situation obvious.²⁹ The

26 I.a. the dissenting opinion of Bonello in *Al-Skeini and Others v. The United Kingdom* (App. No. 55721/07) 53 *Eur. Ct. H.R.* 18 (2011) (GC), where he proposes to “return to the drawing board” on this issue.

27 *Hirsi Jamaa v. Italy*, *supra* note 2, para. 72.

28 *Xhavara et quinze autres v. l'Italie*, Appl. No. 39473/98. *Eur. Ct. H.R.* See on this Rick Lawson, *Life after Bankovic*, in *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 83, 99-100 (Fons Coomans & Menno T. Kamminga eds., 2004).

29 Echoing the Court in *Banković*, O'Boyle objects that in *Xhavara* no jurisdiction objected was recorded, suggesting that the Court might have found jurisdiction problematic if it had, Michale O'Boyle, Comment on “Life after Banković,” *reprinted in* *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* 125, 134 (Fons Coomans & Menno T. Kamminga eds., 2004). However, he ignores that no objection from either Italy or Albania is recorded at all in *Xhavara*, which deprives this argument of its validity.

Court's position in *Xhavara* is consistent with cases that are quite similar to the interception situation, concerning acts of functionaries of embassies abroad³⁰ and was confirmed in *Hirsi Jamaa* discussing interception on the high seas of migrants by Italian coast guard and navy vessels.³¹

In conclusion, the first situation (border deaths occurring within the territorial waters of a State) is clearly within the jurisdiction of that State. The third situation (interception on the High Seas – *Xhavara*, *Hirsi Jamaa*) also is clearly within the jurisdiction of the intercepting state. The second situation is less clear. One may apply the *Banković*, line and deny jurisdiction. One may also argue that it would be odd to find this case not within the jurisdiction of the State, while the third is; therefore – in the functionalist view – the conclusion should be that the situation indeed is within the jurisdiction of the relevant State.³² A conventional approach would contrarily argue that there is nothing odd in distinguishing between, on the one hand jurisdiction on the territory and jurisdiction by state officials acting outside the territory and, on the other hand, state acts on the territory having effects outside the territory without state agents being active outside the territory as well.

Positive Obligations

If one accepts that State accountability is not excluded on grounds of jurisdiction, a next issue is how European states could be argued to violate human rights of migrants who drown at sea. One could imagine two versions of an argument critical of the present situation. In its most radical form, the argument that border deaths constitute an actual violation of Convention rights would not require the doctrine of positive obligations. This argument would hold that state acts (i.e. border policies) lead to border deaths; hence, these acts (i.e. border

30 X v. Federal Republic of Germany, App. No 1611/62, 62 Eur. Comm'n. H.R. Dec. Rep. (1965); M. v. Denmark, App. No 17392/90, 90 Eur. Comm'n. H.R. Dec. Rep. (1992). Recently, *Al-Skeini and Others v. The United Kingdom*, see *supra* note 26. The U.S. Supreme Court held otherwise for the Refugee Convention, see *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993). Apart from the fact that this judgment did not concern the ECHR, it has been strongly criticized, see, i.e., GUY S. GOODWIN-GILL & JANE McADAM, *THE REFUGEE IN INTERNATIONAL LAW* 246-250 (2007); JEAN-YVES CARLIER, *DRIT D'ASILE ET DES RÉFUGIÉS. DE LA PROTECTION AUX DROITS* 106-10 (2008); JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 335-42 (2005).

31 See *Hirsi Jamaa and others v. Italy*, *supra* note 2, para. 81.

32 See for a comparably broad notion of jurisdiction Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion* (2003), reprinted in *REFUGEE PROTECTION IN INTERNATIONAL LAW* 87, 110-11 (Erika Feller, Volker Türk, & Frances Nicholson eds., 2003).

policies as such) violate Convention rights. The consequence of this argument would be that border policies as such constitutes a violation of the Convention, hence the practice of policing borders should be stopped. Obviously, this position is hard to sustain in light of the Court's unwavering case law holding that, subject to their treaty obligations, states have the right to control the entry of aliens.³³ Whereas a critique of the Court's position may be appropriate, I do not undertake such a critique here and take the Court's position as a given. I do, therefore, not investigate whether migrant deaths infringe on a negative obligation of states.

However, if one relies instead on the doctrine of positive obligations, one can develop a human rights analysis of border deaths while at the same time not denying States' right to control the entry of aliens. A conventional approach would hold that the border deaths, even accepting that in a statistical sense they may be related to European border control policies, are too remotely connected to these policies. These policies are one of the factors among many others that play a role. But apart from these policies, various other factors and actors play a role. Decisions taken by smugglers and migrants are relevant; the weather plays an important role, as does the reliability of the vessels used. A conventional approach would emphasize that the main decision (i.e. to migrate without the documentation required) was taken by the migrant, hence the main responsibilities for the risks involved in that choice are the migrant's.

The functional argument would admit that, under the International Law Commission Rules on Responsibility of States for Internationally Wrongful Acts,³⁴ States are not responsible for the fatalities resulting indirectly from border policies because border control in itself is not a wrongful act. Under some circumstances, however, states may be responsible for damage arising out of acts not prohibited by international law. This may be the case if a State undertakes a hazardous activity, defined by the International Law Commission as "an activity which involves a risk of causing significant harm."³⁵ This is precisely the case at hand. An indication that, indeed, obligations toward undocumented migrants do exist can be found in Article 16 paragraph 1 of the 2000 *Protocol Against the Smuggling of Migrants by Land, Sea And Air, Supplementing the United Nations Convention Against Transnational Organized*

³³ The Court has held so since its foundational judgments *Abdualaziz Balkandali* and *Cabales v. The United Kingdom*, *supra* note 22 and *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989). It repeated this in our particular context in the *Xhavara* decision, *supra* note 24.

³⁴ See the Annex to G.A. Res 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001).

³⁵ International Law Commission. Res. U.N. Doc A/CN.4/L.686 (May. 26, 2006).

Crime,³⁶ which stipulates that states shall take “all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of [smuggling] as accorded under applicable international law, in particular the right to life.” In light of the definition of smuggling in Article 3(a) of the Protocol, this provision is applicable in this context. Further indications of a positive obligation to prevent the loss of life at sea can be found in international maritime law.³⁷

The European Court of Human Rights has developed a position on the obligation of States to safeguard the lives of those within its jurisdiction.³⁸ In *Osman*, the central issue was whether the authorities had protected the life of a man and his son from attack by a stalker.³⁹ In *Keenan*, the issue was whether the United Kingdom had protected the life of a suicidal man.⁴⁰ In *Öneryildiz*, the Court dealt with an explosion at a waste-collection site in Istanbul, in which nine people were killed.⁴¹ Three issues are central to this line of case law. Firstly, it must be decided whether the authorities knew or should have known that there was a real and immediate risk for the life of an individual. The second issue is whether the authorities took all necessary measures that could reasonably be expected to prevent the risk from materializing. And, third, if the risk has materialized, the state must respond adequately, in particular by conducting an official investigation.

As to the first issue (were the authorities aware of the risk, or should they have been), the Court formulated an individualized criterion in *Osman*. It held that it has to be established whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals. The Court does not accept the position of the

³⁶ Adopted by G.A. Res. A/RES/55/25 (Nov. 15, 2000) at the fifty-fifth session of the General Assembly of the United Nations, available at <http://www.unhcr.org/refworld/docid/479dee062.html>.

³⁷ For example, Article 98 of the U.N. Convention on the Law of the Sea, Nov. 16, 1994, 1833 U.N.T.S. 397; Article 12 of the Convention on the High Seas, Sep. 30, 1962, 450 U.N.T.S. 397; The International Convention on Salvage, 1989 U.N.T.S. 194; International Convention for the Safety of Life at Sea, 1974, 1184 U.N.T.S. 3, especially arts. 7 and 33; International Convention on Maritime Search and Rescue, 1979, 1405 U.N.T.S.; see generally PATRICIA MALLIA, *MIGRANT SMUGGLING BY SEA: COMBATING A CURRENT THREAT TO MARITIME SECURITY THROUGH THE CREATION OF A COOPERATIVE FRAMEWORK* (2009).

³⁸ See extensively PIETER VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 355 (4th ed. 2006); D. J. HARRIS, M. O'BOYLE, COLIN WARBRICK, & ED BATES, *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 42-46 (2d. 2009).

³⁹ *Osman v. The United Kingdom*, 1998-VIII, No. 95 Eur. Ct. H.R. (1998).

⁴⁰ *Keenan v. The United Kingdom*, 2001-III Eur. Ct. H.R.

⁴¹ *Öneryildiz v. Turkey*, 2004-XII Eur. Ct. H.R. (GC).

United Kingdom, which argued that the failure to perceive the risk must be tantamount to gross negligence or willful disregard of the duty to protect life.⁴² Comparably, in *Keenan* it examined whether the authorities knew or ought to have known that Mark Keenan posed a real and immediate risk of suicide.⁴³ A conventional approach would emphasize the concrete and individual nature of the risk. In *Öneryildiz*, however, the Court did not repeat the requirement that the authorities should have been aware of the risk to a particular individual. The context is a different one than the situation dealt with in *Osman* and *Keenan*. Referring to the particular context of dangerous activities (in that case: waste collection), the Court placed special emphasis on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives.⁴⁴ When it addresses the particular circumstances of the case, it states that there was practical information available to the effect that the inhabitants of certain slum areas of Ümraniye were faced with a threat to their physical integrity on account of the technical shortcomings of the municipal rubbish tip.⁴⁵ It then concluded that the Turkish authorities knew, or ought to have known, at several levels that there was a real and immediate risk to a number of persons living near the Ümraniye municipal rubbish tip. They consequently had a positive obligation under Article 2 of the Convention to take such preventive operational measures as were necessary and sufficient to protect those individuals.⁴⁶ It is important to note that the Court has accepted a positive obligation in this situation, where a group of people living in an identifiable area was at risk, without being clearly identified as a number of particular individuals. A second important thing to note is that the Court has accepted that there can be a positive obligation in respect to a risk that does not emanate from a particular person. In *Öneryildiz*, the risk was the consequence of a combination of human activity (waste collection) and natural processes (the formation of methane gas). Where the risk to life arises from inherently dangerous, but basically lawful, activity, such as military tests, the operation of a factory involving toxic emissions, or of a large waste disposal site, the state has a duty to provide an effective system of regulation, supervision, and control, providing for identification and correction of any dangerous shortcomings.⁴⁷ In

⁴² *Osman*, *supra* note 39, para. 16.

⁴³ *Keenan*, *supra* note 40, para. 93.

⁴⁴ *Öneryildiz*, *supra* note 41, para. 90.

⁴⁵ *Id.* para. 98.

⁴⁶ *Id.* para. 101.

⁴⁷ CLARE OVEY & ROBIN C.A. WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 64 (4th ed., 2006), references omitted.

addition, the State may owe positive obligations to the public at large, as when a State operates a system of leave or relaxed custody for prisoners at the end of their term. The State then owes a duty of care to members of the public in respect of any risk to their lives that may be reasonably anticipated.⁴⁸

In the context of border policies, functionalists could argue that the group of potential victims is sufficiently identifiable – that is, those who will set off from the coasts of North and West Africa, and Asia Minor, trying to reach Europe. Admittedly, this group is more fluid than the group of people living close to the Istanbul rubbish dump. However, the Istanbul group was not constant either (people were born and died, moved in and out of the area, came for visits, left during parts of the day for work, or other reasons). European border policies increase risks for a clear category of people, being that of people in particular geographical areas who remain there (often for a protracted period of time) with the aim of sailing to Europe. That this is a large category cannot be an argument against a positive obligation; it makes a possible infringement more serious, and not the other way around. The counter-argument would hold that the Istanbul group had a clear core (the inhabitants at any given moment), whereas the group of potential migrants is inherently fluid.

As to the second question (whether all necessary measures were taken to ward off the risk), the Court has time and again emphasized that the positive obligation to protect life must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from “materializing.” The Court rejects the position that the failure to take preventive measures to avoid that risk must be tantamount to gross negligence or willful disregard of the duty to protect life. A conventional approach would emphasize this: States actively try to combat the phenomenon migrants are dying of (irregular migration), hence they do what they can reasonably be expected to do in order to save migrants’ lives. However – a functionalist approach would reply – the criterion applied by the Court (did the authorities do all that could be reasonably expected of them to avoid a real and immediate risk to life⁴⁹) leads to a case-by-case approach.⁵⁰ In *Öneryildiz*, in order to assess what the authorities were obliged to undertake, the

48 *Mastromatteo v. Italy* (App. No. 37703/97) 2002-VIII Eur. Ct. H.R. (GC); see *supra* note 34, Harris, O’Boyle, Warbrick, & Bates, *supra* note 38, at 46.

49 For slightly different formulations, see Keenan, *supra* note 40, para. 90: did the authorities fail “to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”

50 See *Osman*, *supra* note 39, para. 116.

Court finds it relevant that the authorities themselves had set up the site and authorized its operation, which gave rise to the risk in question.⁵¹ Also, the Turkish government argued that the victims of the methane explosion had knowingly chosen to break the law and live in the vicinity of the rubbish tip.⁵² The Court rejected this argument, holding that the authorities had consistently tolerated slums in the vicinity of the refuse dump and could not maintain that any negligence or lack of foresight should be attributed to the victims; it also found relevant that the Turkish authorities had remained passive in face of the unlawful dwellings.

It is relevant that the argument which seems to be most forceful in rejecting a positive obligation in the border death context (namely, migrants themselves take these risks so States cannot be held responsible if they materialize) is rejected by the *Öneryildiz* Court in terms that may be directly applied in the border control context. One would expect the Court to find the fact that migrants knowingly choose to break immigration law and seek to cross border evading border control points not decisive. European states themselves have set up these particular border policies, which give rise to the risk in question. That is, in fact, the core of the argument for accepting a positive obligation: States should incorporate into their policies a serious effort to minimize unintended side-effects, in particular if these side-effects consist in the foreseeable death of hundreds, if not thousands, of people each year. The conventional argument against a positive obligation can rely on one aspect in which the border control context differs radically from the *Öneryildiz* case. One cannot maintain that European states tolerate or have remained passive in the face of undocumented migration. Obviously, one could argue that European states engage in combating undocumented migration in the full knowledge that they will fail and that their policies increase the risks; but undeniably, it is hard to directly rely on *Öneryildiz* on this point.

The third issue concerns how the authorities should respond if the risk has materialized. The adequate response the Court has dealt with (most extensively in *Öneryildiz*) is focused on investigations in order to establish criminal responsibility of third parties or government officials, or to allow for civil, administrative, or disciplinary remedies for the victims.⁵³ In the border control context, however, the allegation would not be that individual government agents have carried out border controls in an inappropriate way; if that were the complaint,

⁵¹ *Öneryildiz*, *supra* note 41, para. 101.

⁵² *Id.* para. 103.

⁵³ See *Öneryildiz*, *supra* note 41, paras. 91-92.

the framework the Court has been developing so far would be appropriate. However, the allegation in the border context is that policies have been *designed* (as opposed to execute) without appropriate consideration of the risks they entail. In this context, the very general starting point of the Court is all there is:

Where lives have been lost in circumstances potentially engaging the responsibility of the State, that provision entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.⁵⁴

The Court took a comparable position in *Menson*, where the United Kingdom was not responsible for the death of Michael Menson (who was set on fire by four white youths), but nevertheless was under an obligation to institute an official investigation.⁵⁵

In the context of border control, an obligation to instigate an investigation into the behavior of State officials will sometimes be relevant. This happened in the *Xhavara* case. It is obvious that such investigation should be undertaken when a migrant vessel has been sunk, as in the *Xhavara* case, or when migrants have been shot or have stepped on land mines at the Turkish/Greek border.⁵⁶ But the issue at stake here is a more difficult one. If migrants simply drown, or

⁵⁴ *Id.* para. 91.

⁵⁵ *Menson and Others v. The United Kingdom* (App. No. 47916/99), 2003-V Eur. Ct. H.R. 826.

⁵⁶ This happens with some regularity. According to press reports quoted by United, migrants were shot on March 29, 1995 (Greece), August 20, 1995 (France), September 5, 1996 (Spain), August 17, 1998 (Italy), May 10, 2000 (Turkey, 9 persons), November 15, 2000 (Turkey), December 3, 2000 (Spain), July 16, 2001 (Turkey), January 12, 2002 (Turkey), 2 persons, March 2002 (Macedonia, 7 persons), May 22, 2002 (Turkey), June 19, 2002 (Turkey, 2 persons), September 23, 2003 (Greece), October 3, 2003 (Spain), April 11, 2004 (Spain), April 17, 2004 (Slovakia, 2 persons), September 10, 2005 (Greece), September 19, 2005 (Turkey), September 19, 2005 (Morocco, 5 persons). Migrants died in the minefields at the border between Turkey and Greece on September 13, 1995 (4 persons), June 30, 1996 (2 persons), September 15, 1997 (3 persons), April 16, 1998 (2 persons), August 26, 1999 (3 persons), October 31, 1999 (5 persons), May 1, 2000, August 29, 2000, September 1, 2000 (2 persons), March 29, 2001 (2 persons), May 21, 2001, May 22, 2001 (2 persons), September 30, 2001, December 23, 2001 (4 persons), March 20, 2002 (2 persons), March 27, 2002, August 28, 2002, January 4, 2003 (2 persons), March 2003, September 29, 2003 (7 persons), August 5, 2004, November 14, 2004 (3 persons), April 4, 2005 (2 persons), May 29, 2005 (2 persons), December 9, 2005 (2 persons), May 30, 2006 (1 person), July 3, 2006 (3 persons), July 25, 2006 (2 persons), September 10, 2006 (2 persons), December 3, 2006 (Morocco, 1 person), August 1, 2007 (Morocco, 2 persons), November 8, 2007 (Greece, 1 person), November 16, 2007 (Cyprus, 1 person), January 1, 2009 (1 person). See <http://www.unitedagainstracism.org/pdfs/listofdeaths.pdf>.

die in other ways but not through an activity of a State official directed at them personally, what would the required adequate response consist of?

A conventional approach would hold that situations in which there have been acts of state agents directed against the purported victims (as in *Xhavara*), or situations where there was evidence of a criminal offence (as in *Menson*), are not to be put on an equal footing with a situation where there is no criminal offense against the life of the victim, no direct state action, and the issue at stake is an abstract policy. There can be no obligation to investigate and, depending on the outcome of such an investigation, to adapt border control policy. One may find this desirable from an ethical point of view, but in the conventional approach it cannot be a legal obligation.

A functionalist approach would hold that there are three ways in which European states should respond. Firstly, border deaths are related to European border policies. Their number is related to the externalization of border control and intensification of patrols on relatively safe sea routes. The core of the issue is whether there is a sufficient relationship between these policies and border deaths. Certainly the two phenomena are *related*, but whether the relation is sufficiently close is another matter. In order to be able to assess these policies in light of international law, it is necessary that more detailed and reliable information becomes available. The phenomenon of border deaths is of such magnitude that it can be argued that States are under an obligation to collect these data. One may argue that there is an obligation under Article 2 ECHR to monitor in a consistent way the consequences of these policies. Presently, there are no reliable data on the number of border deaths. Within an EU context, a shared approach must be developed for collecting these data from local or maritime authorities who take care of the corpses. These data should be as specific as possible about the time and place the bodies were recovered, cause and circumstances of death, the identity of the migrant, and the like.

Secondly, one may argue that there is an obligation to subsequently evaluate border control policies regularly in light of the data collected in that way. If a policy has potentially lethal side-effects, there is an obligation to assess how these side-effects develop, whether these developments may be related to policy changes or changes in the context, and whether the unintended side-effects can be limited by (flanking) policy measures.

Thirdly, one may argue that States have an obligation to the surviving relatives of the victims. They must try to identify the bodies, using information about the region of origin of the victim, testimony of surviving fellow migrants, and if possible finger prints, DNA, and other tools of international policing. As Stefanie Grant has argued, the “vast arsenal of technology used in border control (should be diverted) to the humanitarian task of maintaining a register

of those who die making the journey toward their border; relatives could access the records at some future time.”⁵⁷

To sum up: one can conceive of a conventional approach denying the existence of any positive obligation in the context of migrant deaths. This mainly relies on the fact that border policies are not the only, and arguably not the main factor in the climbing number of migrant deaths. A functionalist approach, even when it does not dispute that, may well argue that border deaths give rise to three distinct positive obligations, fulfillment of which together comply with Article 2 ECHR: first, the obligation to carry out an investigation into the number of fatalities at the European borders over the past decades, and in the future to collect such data at least annually; second, the obligation to assess European border control policies in light of these data, in order to develop (flanking) policies which effectively minimize the number of fatalities; and third, the obligation to establish the identity of the victims, to inform their relatives, and to deal with the bodies in accordance with their wishes as far as possible.

Standing

In addition to raising complex issues of jurisdiction and positive obligations, border deaths are also problematic from the point of actual justiciability, because victims simply are unable to bring their cases as a consequence of precisely the behavior which, arguably, violates the Convention. They are dead and the identity of the great majority of the victims is unknown. Their surviving kin is unknown, and therefore the theoretical possibility that they litigate⁵⁸ will remain theoretical. It may take a class action to bring these issues to court. It is significant that only one border death case has been brought before the European Court of Human Rights.⁵⁹ In that case, *Xhavara*, the deaths occurred very close to the country of origin, which increased the likelihood of surviving kin knowing about it.

The position of the Court is that organizations may address the Court, but neither individuals nor organizations can bring an *actio popularis*, or abstract complaints. It has summed up its position as follows:

⁵⁷ Stefanie Grant, *Recording and Identifying European Frontier Deaths*, 13 EUR. J. MIGRATION & L. 135 (2011). Comp. Council of Eur. Com. H.R.: The Human Rights of Irregular Migrants in Europe, CommDH/IssuePaper (2007)1, Strasbourg, Dec. 17, 2007, Conclusion 3: “It is imperative to begin a process to identify and account for the thousands of ‘missing’ undocumented migrants, who disappear – on the journey or after arrival – and whose identities are unknown.”

⁵⁸ See, e.g., Keenan, *supra* note 40.

⁵⁹ See *supra* note 28.

The Court reiterates that Article 34 of the Convention requires that an individual applicant should claim to have been actually affected by the violation he alleges. That Article does not institute for individuals a kind of *actio popularis* for the interpretation of the Convention; it does not permit individuals to complain against a law *in abstracto* simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment.⁶⁰

(Klass and Others v. Germany, 6 September 1978, Series A no. 28, § 33)

This seems to exclude the possibility of a complaint lodged by NGOs on border policies.⁶¹ Therefore, the conventional approach seems a very comfortable one.

However – a functionalist would retort – it should be noted that the Court's concern is that it should not give judgment about potential human rights violations. It explains its objections to the *actio popularis* and abstract complaints by emphasizing this, and by outlining the limited number of exceptions. In order to adjudicate a potential violation, the applicant must produce “reasonable and convincing evidence of the likelihood that a violation affecting him personally will occur; mere suspicion or conjecture is insufficient in this respect.”⁶² However, in border death cases, the issue is not that the alleged violations have not yet taken place. Instead, they have taken place, and precisely because of that European states may well have succeeded in keeping the purported victims of European border policies effectively outside the scope of European courts.

In this context, the proper parallel – still according to a functionalist – would not be that of the objections against the *actio popularis*, but that of unrepresented minors. The Court has ruled on a conflict over a minor's interests between a natural parent and the person appointed by the authorities to act as the child's guardian. It held that the mother's standing as the natural mother suffices to afford her the necessary power to apply to the Court on the children's behalf, too, in order to protect their interests.⁶³ It ruled likewise in cases concerning persons who lost their legal capacity after being committed to a psychiatric hospital.⁶⁴ On the basis of this, it may be argued that an NGO can have

60 The Christian Federation of Jehovah Witnesses in France v. France (App. No. 53430/99) 2001-XI Eur. Ct. H.R. *Compare with* La Ligue des Musulmans de Suisse (App. No. 66274/09) given June 28, 2011.

61 Cf. VAN DIJK ET AL., *supra* note 38, at 483, 55-56; Harris, O'Boyle, Warbrick, & Bates, *supra* note 38, at 791-93.

62 See Harris, O'Boyle, Warbrick, & Bates, *supra* note 38, at 792 and the case law referred to there.

63 Scozzari v. Italy (-App. No 39221/98 and 41963/98) 2000-VII Eur. Ct. H.R. par. 138 (GC).

64 Winterwerp v. The Netherlands (App. No. 630/173) 33 Eur. Ct. H.R. (Ser. A) (1979), para. 10.

standing on behalf of victims who have not addressed the Court, provided that (1) it is necessary to accept their standing for an effective protection of Convention rights – in this case because the victims are effectively outside the scope of European courts; and (2) provided that it has been established that one or more violations have already taken place, that is, the application does not concern a potential violation.

Which State?

A last issue concerns joint operations of European states, whether or not under the banner of Frontex, the EU border agency. Because of the cooperation of European states in border control, one may well argue that responsibility for border deaths does not, or not exclusively, lie with Mediterranean states, but with all European states – it is their joint border that is being guarded even if the actual work is often done by States such as Spain, Italy, Greece, Malta, and Cyprus.

A conventional approach would hold that it is entirely unclear as a result of which State actions the migrants are argued to have died. Would it be the State at which shores the body was found? Or all Mediterranean states? All Schengen states, because they have a common external border control? Or all EU States, because Frontex is a European agency? There can be no state responsibility if the wrongdoer cannot be identified.

In *Bankovic*, the applicants lodged a complaint against 17 States, being those NATO Member States which were also parties to the ECHR. The issue there was whether States are liable for an act carried out by an international organization of which they are members.⁶⁵ The difference with border controls is that these are not carried out by the EU, but by Member States, possibly in joint operations. The similarity is that the airplanes dropping bombs on Belgrade were not NATO airplanes, but airplanes of NATO Member States even though they were acting under NATO command. In any case, the issue was explicitly not decided by the Court. There seem to be no obstacles to joint responsibility of EU Member States for the way border controls are carried out, but much will depend on the circumstances of the case. However, even if EU States were to transfer competence in the area of border control to the EU, they would remain responsible for guaranteeing Convention rights.⁶⁶ A functionalist would emphasize that the issue has not been decided by the Court and that the Court has emphasized that cooperation between

⁶⁵ See Banković, *supra* note 24, paras. 30 and 83.

⁶⁶ *Matthews v. The United Kingdom* (App. No. 24833/94), 1999-I Eur. Ct. H.R. (GC); See *Ovey & White*, *supra* note 38, at 30.

states cannot be allowed to affect the scope of their responsibilities under international law. In *T. I. v United Kingdom*, it held that where States establish international organizations, or *mutatis mutandis* international agreements, to pursue cooperation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.⁶⁷ A functionalist approach would hold that relying on the problem of having to identify the specific state that is responsible for this particular death is merely a procedural version of seeking absolution from human rights responsibility via international cooperation.

Conclusions

Do European states have a positive obligation to minimize the rising number of fatalities (the hypothesis I rely on in that respect was laid out in paragraph 2, Introduction, which occur in relation to their border policies? An argument that, indeed, such a positive obligation does exist is possible. It does require acceptance of some innovative elements on the points of jurisdiction and positive obligations. A convincing case can be made that these innovative elements do nothing but mirror the innovative aspects of European border policies that I have outlined in paragraph 1, Introduction. A central effect of European border policies over the past 20 years has been that their consequences occur outside Europe, before migrants reach Europe, so that they are out of reach of Europe's legal systems. If law is to be effective in upholding human rights, it has to keep pace with policy innovations, the effect of which that the consequences are out of the reach of human rights law. However, the argument to the contrary is valid as well. It can be argued that jurisdiction should not be stretched to make European states responsible for the consequences of their policies outside their territory, unless State agents themselves act outside the territory. In addition, it can also be argued that a positive obligation can only exist vis-à-vis groups of people who are more determinate than migrants are. Finally, one may argue that States are not responsible for the consequences of what people do when they seek to contravene policies that are actively enforced by the authorities.

⁶⁷ T.I. v. The United Kingdom (App. No. 43844/98) 2000-III Eur. Ct. H.R., *referring to* Waite and Kennedy v. Germany (App. No. 26083/94) 1999-I Eur. Ct. H.R. 67.

As to the procedural issues, the situation is similar. Should standing of NGOs on behalf of people who cannot act for themselves be accepted? Should States be held responsible collectively for the effects of joint policies, if a requirement of individual responsibility would make it impossible, or at least very difficult, for claimants to effectuate a claim? The argument can be made that this should be accepted because it is necessary to uphold human rights protection for a group in dear need of it. But the argument can also be made that this should not be accepted because it would open the possibilities for litigation too much and could lead to State responsibility for situations in which it is not clear whether they are sufficiently involved.

Legal arguments tend to get terribly complicated when they deal with an issue that is the subject of substantial disagreement. That is what we can observe here. On the one hand, there is the perception that Europe may be (or actually is being) beleaguered by alien hordes unless effective border policies remain in place. The widening gap in affluence between Europe and many other parts of the world, coupled with increasing international mobility, requires innovations of border control. From that perspective, externalization at the European level seems like a good move. On the other hand, there is the perception that effective protection of human rights – not just the protection of wealth – is at the core of the European project. Border policies may well be necessary for protecting this European project. But that makes it all the more crucial that, precisely in that context, the effective protection of human rights is not diluted.

These issues are not merely legal ones but also involve moral, ethical, and political choices. In making such choices, legal arguments can play a role. It would have an effect on European policy making if it were presumed that European countries are potentially responsible under human rights law for migrant deaths. Yet, legal arguments do not determine these choices. We are acutely aware that migrants are on the move. But in response to their moves, States have made counter-moves; they have redeployed policy instruments that they already had in innovative ways, making policy effects occur outside their territory. They have expanded the horizon of their policies and have designed policies with external effects. How should human rights law respond to the move of these effects from the territory of European states to outside their territories? Should it stick to the territorial focus characterizing human rights law until now? Or should it rely on those threads in case law and doctrine that allow for a functionalist approach? Until now, the issues dealt with in this article have mainly been ignored. Europeans prefer to look the other way on the issues of border deaths. The least we can do is to notice, to register, and to take account of the human costs – to others – of protecting our European project.

Only when we have begun to do that can we decide whether a fair balance between costs and benefits has been struck.

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Annex: Migrant deaths in Pazallo and Porto Empedocle (Sicily)

Date of death	Statu Civile	Number	M/f/unknown	Place where found	United?	Fortress Europe?	Commissario 2011?
11-9-1998	Pozallo	1			0	0	1
24-6-1999	Vittoria	1			0	0	1
7-3-2002	Porto Empedocle	1	F	Sea, Pelagia	1	1	1
7-3-2002	Porto Empedocle	1	M	Sea, Pelagia	1	1	1
7-3-2002	Porto Empedocle	1	M	Sea, Pelagia	1	1	1
7-3-2002	Porto Empedocle	1	M	Sea, Pelagia	1	1	1
7-3-2002	Porto Empedocle	1	F	Sea, Pelagia	1	1	1
7-3-2002	Porto Empedocle	1	F	Sea, Pelagia	1	1	1
7-3-2002	Porto Empedocle	1	F	Sea, Pelagia	1	1	1
7-3-2002	Porto Empedocle	1	M	Sea, Pelagia	1	1	1
7-3-2002	Porto Empedocle	1	M	Sea, Pelagia	1	1	1
7-3-2002	Porto Empedocle	1	F	Sea, Pelagia	1	1	1
7-3-2002	Porto Empedocle	1	M	Sea, Pelagia	1	1	1
7-3-2002	Porto Empedocle	1	M	Sea, Pelagia	1	1	1
26-5-2002	Porto Empedocle	1	M, Ibrahim Yahya ABAKER, Sudan, 1975	Sea, Lampedusa	0	0	0

(continued)

(Continued)

Date of death	Statu Civile	Number	M/f/unknown	Place where found	United?	Fortress Europe?	Commissario 2011?
14-5-2003	Porto Empedocle	1	?, black	Sea, lampedusa	?	?	0
15-12-2003	Aacate	1		Contrada Dirillo-Chiappa	0	0	1
24-3-2005	Pozzallo	1	M	Sea, Sicilian coast	1	1	0
24-3-2005	Pozzallo	1	M	Sea, Sicilian coast	1	1	1
24-3-2005	Pozzallo	1	M	Sea, Sicilian coast	1	1	1
24-3-2005	Pozzallo	1	M	Sea, Sicilian coast	1	1	1
24-3-2005	Pozzallo	1	M	Sea, Sicilian coast	1	1	1
24-3-2005	Pozzallo	1	F	Sea, Sicilian coast	1	1	1
24-3-2005		1	M, oriental	During rescue operation at sea	0	0	1
8-9-2005	Porto Empedocle	1	?	Sea, Siciliana coast	0	?	2
11-9-2005	Porto Empedocle	1	?	Sea, Siciliana coast	0	1	0
22-10-2005	Porto Empedocle	1	?	Sea, Lampedusa	0	0	1
24-7-2006	Acate	1		Harbor of Acate	0	0	1
24-7-2006	Acate	1		Harbor of Acate	0	0	1
9-8-2007		1	Joboo Dead MALIK	Found at sea on board of Chelyabinsk with 26 migrants alive, brought on land at Pozzallo, report in registry	0	0	0
1-9-2007	Pozzallo	1		Sea, Correnti Isle	0	1	1
Total		55			39	41	57

Sources: Statu Civile Pazallo, Porto Empedocle; United; Fortress Europe; Italian Ministry of the Interior.